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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1649

~~75-1646~~

SOCIEDAD CIVIL AGRICOLA E INDUSTRIAL SUCESION J. SERRALLES, *Petitioner,*

v.

COMMONWEALTH OF PUERTO RICO, *Respondent.*

On Appeal from the United States District Court for the District Court of Puerto Rico

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OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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TO THE HONORABLE COURT:

Comes now respondent through its undersigned attorneys and respectfully requests that the Writ of Certiorari requested by Petitioner be denied.

PROCEDURAL BACKGROUND

The facts of this case as to the procedural background before the Commonwealth of Puerto Rico Courts, as stated by Petitioner in its Petition for Writ of Certiorari are correct and in order to avoid repetition we adopt them herein.

STATEMENT OF THE CASE

Pursuant to its powers of eminent domain, on October 17, 1968, the government of the Commonwealth of Puerto Rico initiated a condemnation proceeding against some lands belonging to petitioner, in the Superior Court of Puerto Rico, Court of Eminent Domain. On that same date, the Commonwealth consigned the sum of $856,889.00 as fair compensation for the 158.3973 "cuerdas"[1] taken. After extensive hearings held before said court, it determined on October 15, 1971 that the fair compensation for those lands should be $1,232,963.65 and ordered the Commonwealth to consign an additional sum of $371,896.65 to the one originally consigned, plus interest at 6 percent annually on the amount, beginning as of October 17, 1968, which was done. As the basis for this determination the Superior Court took into consideration all the evidence submitted by the parties, and issued a very detailed judgment stating the reasons for its conclusions.[2] The Court of Eminent Domain concluded that of the 158.3973 "cuerdas" taken, 76.1873 "cuerdas" should be paid at $12,000 each, and the remaining 82.21 at $3,000. Its basis for this determination was the fact that the best use for the 76.1873 "cuerdas", is an industrial one, while the best use for the other 82.21 "cuerdas" is agricultural, increased by its potential to build facilities for aid to air navigation. Petitioners did not question, and accepted the value gives to the 76.1873 cuerdas, and appealed to the Supreme Court of Puerto Rico to review the value which as first compensation the trial

[1] A "cuerda" is a measure of land consisting of 43,290 square feet, which is less than 1% smaller than an acre.

[2] Petitioner has informed us that he will submit to this Court a certified copy of a translation of this judgment.

court granted to the remaining 82.21 cuerdas. Through a Per Curiam Opinion dated November 12, 1975,[3] the Supreme Court of Puerto Rico affirmed the judgment of the Superior Court. It is from this judgment that petitioners seek review through writ of certiorari from this Court.

Since the 1963 taking is not an issue before this Court, we will refer to it in the discussion of the reasons for denying the writ, as to those points where it is relevant.

JURISDICTION

The jurisdiction of this Court was invoked under 28 U.S.C. Sec. 1258 (3).

Said statute states that:

"Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court as follows:

(1) ----------

(2) ----------

(3) By writ of certiorari, where the validity of a treaty as statute of the United States is drawn in question or when the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of or commission

[3] Appendix A of the Petition.

held or authority exercised under, the United States."

The present form was given to said statute in 1961 in order to eliminate the right to appeal from the Supreme Court of the Commonwealth of Puerto Rico to the Court of Appeals for the First Circuit and to provide that final judgments and decrees entered by the Supreme Court of Puerto Rico shall be reviewed instead by the Supreme Court of the United States.

The Judicial Conference and the Department of Justice supported the passage of this legislation, recognizing that in cases involving a non-Federal question, the Court of Appeals for the First Circuit would not reverse the Supreme Court of Puerto Rico unless the decision is "inescapably wrong" or "patently erroneous". *1961 U.S. Code Congressional and Administrative News,* page 2449.

It has been held repeatedly that the Supreme Court of Puerto Rico should not be reversed in a matter of local law unless the court's determination is "inescapably wrong" or "patently erroneous". *Sancho Bonet* v. *Texas Co.,* 308 U.S. 463 (1940); *De Castro* v. *Board of Commissioners,* 322 U.S. 451 (1944); *C. Brewer P.R.* v. *Corchado,* 303 F.2d 654 (1962); *Acosta-Marrero* v. *Commonwealth of Puerto Rico,* 275 F.2d 294 (1960); *Fullana Corp.* v. *P.R. Planning Board,* 257 F.2d 355 (1958); *Marquez* v. *Avilés,* 252 F.2d 715 (1958); *Iglesias Acosta* v. *Secretary of Finance of P.R.,* 220 F.2d 651 (1955); *Sagastivelza* v. *P.R. Ins.,* 171 F.2d 563 (1949); *Compose* v. *Central Cambalache, Inc.,* 157 F.2d 43 (1946). *This Court* stated in *Fornaris* v. *Ridge Tool Co.,* 400 U.S. 41 (1970) that:

> "The relations of the federal courts to Puerto Rico have raised delicate problems. It is a Spanish-speaking Commonwealth with a set of laws still impregnated with the Spanish tradition. Federal Courts, were inclined to construe Puerto Rican Laws in the Anglo-saxon tradition which often left little room for the overtones of Spanish culture. Out of that experience grew a pronouncement by this court that a Puerto Rican court should not be overruled on its construction of local law unless it could be said to be 'inescapably wrong'. See Bonet v. Texas, Co., 308 U.S. 463, 471."

In order to properly invoke the jurisdiction of this Court, petitioners must present a substantial federal question, not merely a frivolous or colorable one.[4] "It is not enough that a federal question be lurking in the record". *Ramos* v. *Leahy,* 111 F.2d 955 (1940). In the case at bar, notwithstanding petitioner's allegations, the sole question before this Court is whether the appraisal of the 82.21 "cuerdas" at $3,000.00 each was reasonable. We respectfully submit, on the basis of the whole record of the case, that this clearly fails to constitute the federal question upon which this Court would have jurisdiction pursuant to 28 U.S.C. 1258(3), and that Certiorari should be denied for lack of jurisdiction. Nonetheless we intend to show that the Commonwealth courts not only were not "inescapably wrong" or "patently erroneous" but gave the lands in question a reasonable value.

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[4] See: *Prensa Insular de P.R.* v. *People of P.R.,* 189 F.2d 1019 (1951); *Mercado* v. *Lluberas Pasarell,* 225 F.2d 715, cert. den. 350 U.S. 936.

REASONS FOR DENYING THE WRIT

In this section we shall discuss each of the arguments expounded by petitioner as to why the writ should be issued. They deal with the circumstances considered and the criteria used by the Commonwealth Courts in determining the value of the land taken.

(1) The Decision of the Supreme Court of Puerto Rico Does Not Conflict with This Court's Decision in Griggs v. Allegheny County.

Petitioner avers that the decision of the Supreme Court of Puerto Rico conflicts with this Court's decision in *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962). This case is completely different from the case at bar. In *Griggs* the defendant county designed its plan for an airport, in compliance with federal requirements. Allowable costs payable by the federal government included costs of acquiring land or easements through airspace. The noise, vibrations, and fear caused to the occupants of plaintiff's residential property located near a runway of the airport by constant and extremely low overflights interferred with the use of the owner's property. This Court held that (1) the interference with the plaintiff's property amounted to a "taking" in the constitutional sense of an air easement, for which compensation must be made; and (2) the defendant county, and not the United States, was the "taker" liable to pay the compensation.

In the case at bar, petitioner admits in its brief[5] that "neither party argues that there has been a taking of a navigational easement through overflights. . ." Yet it states that ". . . the effect of the decision of the Puerto Rico Supreme Court is to enable the Common-

[5] Page 18 of Petition.

wealth to obtain without cost an absolute prohibition on any and all building on the land within the approach zone". This assertion lacks any factual basis. As petitioner has stated in his brief[6] the landing strip of the Mercedita Airport was built by the Sucesión and leased in 1954 to the Commonwealth, so that the Puerto Rico Transportation Authority would operate the landing strip as a commercial airport. The lease contract provided that in the event that the Commonwealth desired to condemn additional adjacent lands for airport purposes, it would pay compensation for the land at its then current market value. On December 27, 1963, the Commonwealth instituted condemnation proceedings, through which it acquired the title in fee simple to the area it had leased and to additional surrounding land owned by the Sucesión. The 1968 taking was initiated with respect to 158.3973 "cuerdas" of the Sucesion's land adjacent to the expanded Mercedita Airport, for further expansion. A portion of this land nearest to the landing strip, 82.21 "cuerdas", lay within the "approach" or "clear" zones associated with the ends of the runway and the "transition" zones associated with the sides of the runway, as defined by the Federal Aviation Administration.[7]

In other words, the land taken—and paid for—in the 1963 and 1968 condemnations included that over which the superadjacent airspace at low altitude is so close to the land, that the use of the airport constitutes the use of the land surface itself.[8] There is no showing, or proof in the record, that the landing strip is so close

[6] Pages 4, et seq. of Petition.

[7] See page 6 of Petition, and Petitioner's Anex II.

[8] *Nichols on Eminent Domain*, Sec. 5.781.

to petitioner's land so as to constitute an invasion of the "superadjacent airspace that will affect the use of the surface of the land itself". *U.S.* v. *Causby,* 328 U.S. 256. On the contrary, it is evident that this additional land was taken in order to cover the "approach" and "clear" zones, and that this is no factual taking of petitioner's land. Low flights, in and of themselves, do not constitute the basis of a cause of action, but they must be coupled with a resulting substantial interference with the use and enjoyment of the property affected.[9] In any event, it is now firmly established that the upper reaches of the atmosphere are in the public domain and that the surface owner's title, if any, is subject to the right of public passage.[10]

In order to apply the *Grigg's* doctrine. there must be a clear showing that the noise, vibrations, and fear caused to the occupants of a property near an airport by constant and extremely low over flights interfere with the use of the owner's property so as to amount to a "taking "of an air easement for which compensation must be made. There has been no such showing, or any proof leading to such a conclusion in the case at bar.

Furthermore, and of utmost importance, we have to remember that the airport was built by petitioners themselves, so that any impact on adjoining land—in this case, petitioners' own land—must have been taken into account when they built the landing strip. This use was reaffirmed when in 1954 they leased the landing strip to the Commonwealth for use as a commercial

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[9] *Id.*

[10] *U.S.* v. *Causby, supra; Freeman* v. *U.S.*, 167 F.Supp. 541; *U.S.* v. *One Pitcairn Biplane,* 11 F.Supp. 24.

airport. The 1963 case was concluded by a judgment approving a stipulation of the parties arrived at in open court. In conclusion, not only there has been no "taking" of petitioner's land through an easement, but had the situation in the case at bar been similar to that of *Griggs,* petitioners would be estopped from claiming any damages under this case's doctrine.

(2) The Puerto Rico Supreme Court's Holding on Res Judicata Did Not Deprive the Sucesion of Its Rights to Due Process.

Article 1204 of the Civil Code of Puerto Rico—31 L.P.R.A. 3343—in its pertinent part, states that:

> "In order that the presumption of the res judicata may be valid in another suit, it is necessary that, between the case decided by the sentence and that in which the same is invoked, there be the most perfect identity between the things, causes, and persons of the litigants, and their capacity as such."

These three elements appear in the 1963 and 1968 cases: (1) There is perfect identity between the things since in 1963 the Commonwealth acquired the right to enjoy a "clear" and "transition" zone to continue operating the airport. (2) There is perfect identity between the causes since in 1963 the petitioner could have claimed damages for the limitations are the adjoining lands; and (3) there is perfect identity between the parties—the Sucesion and the Commonwealth. In upholding the Superior Court's conclusion as to *res judicata* the Supreme Court of Puerto Rico held in its November 12, 1975 opinion in the case at bar, clearly solving this argument, that:

> "The contentions relative to the application of federal regulations, to the doctrine of res judicata,

and to the alleged tacit zoning of the Mercedita Airport are frivolous. Contrary to what appellants argue, the trial court did not conclude that in Puerto Rico regulations which are in conflict with the federal ones may be approved. The trial court limited itself to explain the relation between the different regulatory provisions. The fact that the federal regulations establish height limitations does not exclude the planning Board's power to grant or deny construction permits in airport zones. And the fact that an express zoning of the Mercedita Airport was not made does not bar acknowledgement of restrictions for the benefit of public security.

The respondent court conclude that the claim for damages on account of the segregation made by appellants constitutes res judicata in the 1963 suit. It is correct. In that suit between the same parties, and stemming from the same matter as the 1968 one, the defendant, appellant herein, did not claim such damages. A final and unappealable judgment as that of the case of 1963, constitutes res judicata not only in relations to the questions raised, but also in relation to those that could have been raised. *Mercado Riera* v. *Mercoda Riera,* 100 P.R.R. 939 (1972); *Isaac Sànchez* v. *Universal C.I.T. Credit,* 95 P.R.R. 361 (1967); *Capó Sànchez* v. *Secretary of the Treas.,* 92 P.R.R. 817 (1965); *Riera* v. *Pizà,* 85 P.R.R. 256 (1962)."

To constitute a taking of property without due process by force or judgment in condemnation proceedings, the error must be gross and obvious, coming close to the boundary of arbitrary action. *Roberts* v. *City of New York,* 295 U.S. 264. The equal protection clause does not exact uniformity of condemnation procedure nor does this clause guarantee any particular form thereof. *Cahill* v. *Cedar County,* 367 F.Supp. 39 (1973),

affd. 419 U.S. 806. It may be said in a general way that the due process clause was intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. Due process require a taking for public use, and compensation.[11] From the procedural point of view, the essential elements of due process require that there be notice and opportunity to be heard, before a competent tribunal, in an orderly proceeding.[12] Matters of procedure are subject to legislative regulation provided that the essential elements of due process are preserved.[13]

From the whole record it is obvious that petitioner at all times has been secured its right of due process, and furthermore, that the Commonwealth courts acted correctly in holding that this point was res judicata. "Due process of law does not mean infallible process of law." (Learned Hand, J.) *Schechtman* v. *Foster,* 172 F.2d 339 (1949).

(3) The Holding of the Supreme Court of Puerto Rico as to Zoning Does Not Violate Petitioner's Rights.

According to the facts stated in section (1), *supra,* this is not a situation like that of *U.S.* v. *Causby, supra,* or *Griggs* v. *Allegheny County, supra;* we are not dealing with an fringement in the government's part on petitioner's property rights, but rather with limitations on property rights imposed by petitioner on itself when it decided to build the landing strip and afterwards to rent it as commercial airport. The so called "tacit

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[11] Nichols On Eminent Domain, Secs. 4.7 and 4.8.

[12] Id., Sec. 4.10.

[13] Id., Sec. 4.102.

zoning" which petitioner mentions, are actually the restrictions imposed by the regulations[14] of the Federal Aviation Agency, which require the "clear" and "transition" areas we have referred to before, and the restriction imposed on areas surrounding airports by the Planning Board of Puerto Rico.[15]

Any person who wants to operate an airport must comply with federal and local regulations. When before 1954, petitioner began to operate the landing strip, there was no question as to the building restrictions imposed on their adjoining land by said operation; these were self-imposed and would affect the adjoining land irregardless of the ownership of the airport or the adjoining land. When in 1954 the airport was leased to the Commonwealth for use as a commercial airport, there was no doubt as to their applicability. So, when in 1963 the airport was taken—at a price agreed to by both parties—it was taken with all its appurtenances, accessions rights and interests belonging to the previous owners. At no time during which the airport was operated by the Sucesión, now when they rented it to the Commonwealth, nor after the Commonwealth acquired it, did petitioner resort to the planning Board of Puerto Rico to request any permits on the lands restricted by the height limitations imposed by the F.A.A. and Planning Board regulations. Furthermore, petitioner failed to raise this point during the 1963 condemnation, for which reason as we have stated before, it became res judicata.

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[14] Part 77 of F.A.A. Regulations.

[15] Articles 90, 91, 92 of Regulations 4 of the Planning Board of Puerto Rico.

Legislative and administrative action which affects property values without any discrimination of the owner's right of use do not constitute a "taking" within the purview of the Fourteenth Amendment. *Chacon* v. *Granata,* 515 F.2d 922 (1975); *Sayre* v. *City of Cleveland,* 493 F.2d 64 (1974); *Woodland Market Realty Co.* v. *City of Cleveland,* 426 F.2d 955 (1970); *23 Tracts of Land, etc.* v. *United States,* 177 F.2d 967, 969-970 (1949). Alteration of a neighborhood by condemnation proceedings does not give rise to a claim for depreciation in value of surrounding property. *Foster* v. *Harley,* 491 F.2d 174 (1974).

In the matter before us, the building limitations—and the ensuing reduction in value—were caused by the public need to regulate areas adjoining airports; this was done by petitioner himself when he built the airport.

We should note that this point refers exclusively to the valuation given to the land immediately adjoining the beginning of the landing strip; there is no issue as to whether these legal restrictions have affected petitioner's remaining land.

In conclusion, there has been no so-called "tacit zoning", but rather, lawful building restrictions arising from Federal and Commonwealth regulations, imposed on the land in question by petitioner's conduct in building the airport, using it, renting it, and not starting any action as to it after the 1963 taking.

(4) The Holding of the Supreme Court of Puerto Rico Does Not Sanction the Commonwealth's Impairment of Its Contractual Obligations.

Petitioner fails to state what the so-called impairment of contractual obligations consists of, and even

fails to provide this Court with a copy of the contract in question or to quote the pertinent clauses. On the other hand, petitioner itself admits that "The Sucesion does not claim that the lease contract binds the Commonwealth not to exercise its power of eminent domain", and further: ". . . the 1954 lease agreement . . . expressly recognized the Commonwealth's power of eminent domain. . ."; also: "Nor does the Sucesion claim that the decisions of the Puerto Rican courts below have created the impairment of contract."[16]

The pertinent clause of the contract in question reads as follows:[17]

> "In the event 'lessee' or the Commonwealth of Puerto Rico requires condemnation of additional adjacent lands for airport purposes, 'lessee', or the Commonwealth, shall, as part of such condemnation, condemn the leased premises. In condemnation of the leased premises the valuation shall not include any added value which the improvements as buildings constructed by 'lessee' may have given to said premises, but the fact of the former use and value of said premises as a private airport as well as the best available use to which said lands may be put, except as a commercial airport, shall be considered as a factor in its valuation.
>
> Any additional land that may be required by the 'lessee' or by the Commonwealth if condemned by eminent domain proceedings or otherwise shall be compensated at its then value, unless an agreement as to such value at such time is arrived at between the parties."

[16] Page 21 of the Petition.

[17] Quoted from the translation appearing on page 3a of Petition's appendix.

It is clear that the Commonwealth obligation, as arising from this contract, was to pay the "then value" or market value of any land taken. This was done.[18] In doing so, the Commonwealth courts used the prevailing criteria to determine the land's value. This contract, if binding for the purposes of the condemnation, does not bar the methods used for the valuation of the lot. It is clear from the record that the value given to the land in question was the most reasonable and corresponded to its market value. Petitioner's assertion that the Supreme Court of Puerto Rico failed to hold "the Commonwealth to its contractual obligations" is totally lacking any factual basis in the record. The Commonwealth's obligation was to pay the fair market value of the land at the time of the taking, not to pay—as petitioner contends—the same price per acre for all the land. In giving different values to different parts of the land taken, the courts below into consideration the following principle enunciated by *Nichols*.[19]

> "Exceptional circumstances will modify the most carefully guarded rule; but as a general rule it may be stated that compensation to the owner is to be computed with reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. Where different segments of a parcel are susceptible of valuation on the basis of differing highest and best uses, it is error to attribute an overall or average unit of value to the entire parcel". (Footnotes omitted).

[18] For the sake of brevity, and since this is the bulk of the 47 page judgment of the Superior Court, we shall not go into detail into the specific criteria used for the valuation.

[19] *Nichols On Eminent Domain*, Sec. 12.314.

Following this well settled principle, the courts below valued the land in question according to the highest and best use that could be given to each part of it after taking into consideration those elements that prevented the whole lot from being classified as one of an uniform or homogeneous nature. For this reason a higher value was given to the land farther from the runway, since that closer to it, particularly in its extensions for the landing and take-off of airplanes, is much more limited in use, not only from a practical point of view, but pursuant to Federal and Commonwealth regulations which arose from a situation independent of the condemnation itself, that is, from petitioner's construction of the airport.

In conclusion, not only has there been no impairment of contractual obligations, but there has been a full compliance with said obligation to pay the reasonable market value of the land taken.

(5) There Is No Basis Whatsoever To Review This Case, Nor Are There Substantial Rights in Jeopardy.

In the section on jurisdiction of this brief we have dealt with the reasons why we understand that there is no jurisdiction for review pursuant to 28 U.S.C. sec. 1258 (3). Nevertheless, we deem it necessary to comment on one of petitioner's arguments, that is: "This 'hands-off' policy may encourage the Puerto Rico Supreme Court to construe the United States Constitution with a flavor indigenous to Puerto Rico". In this case we are not dealing with the construction of the United States Constitution, or of any federal statutes, but with a matter of purely local law, such as is the appraisal of real property for eminent domain purposes. There has been no showing that in any step of

this complex and highly technical litigation, petitioners have been deprived of any federally protected rights; quite on the contrary, from the record of the case it is self-evident that they have been granted all procedural protection and that they have been paid adequately for the land taken. As to the "indigenous flavor", what this Court stated in *Fornaris* v. *Ridge Tool Co.,* is sufficient to dispose of that argument. Constitutional privileges in Puerto Rico are more than amply protected locally by the United States Constitution and the Constitution of Puerto Rico. It is patently frivolous to make this kind of assertion when there is no basis in the record of the instant case, for concluding that there has been any deprivation of federally protected rights and when, on the contrary, this Court has not deemed it necessary in fifteen years to hear any cases arising from the Supreme Court of Puerto Rico.[20]

Finally, petitioner states that "... the decision of the Puerto Rico Supreme Court cast a cloud of uncertainty over the value of the Sucesion's remaining land, which is adjacent to that taken for the airport in this case". This "danger" is hypothetic and highly speculative, and is hardly the case on controversy that would be given consideration in any court, particularly in view of the procedural safeguards available to petitioner, and considering the doctrine of *Chacon* v. *Granata, supra.* Not only there is no such "danger", but even if there were, this is not the case or time in which to deal with it.

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[20] See footnote 48 of the Petition.

CONCLUSION

This case is one purely of local law and of appraisal of land, and there is no federal question involved. For the foregoing reasons certiorari should be denied.

Respectfully submitted.

San Juan, Puerto Rico, this 16th day of July, 1976.

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